

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2015-SC-000114-D

THE ESTATE OF CHRISTINA WITTICH,
by and through Judith Wittich and Frederick
Wittich in their duly appointed capacities as
Co-Adminstratrix and Co-Administrator

APPELLANTS

v.

COURT OF APPEALS NO. 2009-CA-002378
FAYETTE COUNTY CIRCUIT COURT
CASE NO. 08-CI-4294

MICHAEL JOSEPH FLICK

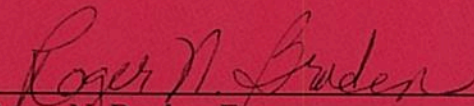
APPELLEE

APPELLANTS' BRIEF

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing to the following by way of U.S. Mail on this the 17th day of December, 2015, and the original and 10 copies were filed in accordance with CR 76.40(2) by overnight Federal Express mail with the Supreme Court of Kentucky, Clerk of Supreme Court of Kentucky, Capital Building, Room 235, 700 Capital Avenue, Frankfort, Kentucky 40601; Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Jennifer Zeigler Hoerner, PO Box 34192, Lexington, Kentucky 40588; Honorable Thomas L. Clark, Fayette Circuit Court, Fayette County Courthouse, Room 511, 120 Limestone, Lexington, Kentucky 40507. I further certify that the record on appeal was not withdrawn from the office of the Clerk of the Court of Appeals.

Respectfully submitted,


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INTRODUCTION

This is a wrongful death action arising from the murder of Christina Wittich by Michael Joseph Flick. The primary issues for review are: (1) Whether the Court of Appeals exceeded its authority by reversing the Circuit Court's decision on an issue that was not presented to the trial court and was not briefed and argued on appeal by the parties?; (2) Whether the Court of Appeals incorrectly construed the Rules of Procedure regarding publication of Court of Appeals' decisions in circumventing the holding of the Court in *DiGiuro v. Ragland*?; (3) Whether the Court of Appeals incorrectly determined that the policy considerations it found dispositive in *DiGiuro* were inconsistent with, and had to yield to, issues allegedly addressed by the General Assembly?; (4) Whether the Legislature's failure to include wrongful death actions within the ambit of actions that must be commenced within one year under KRS 413.140 when the statute was amended in 2013 was an implicit adoption of *DiGiuro's* conclusion that the statute of limitations begins to run in a murder case on the date of conviction?; and (5) Assuming that the Court of Appeals properly invalidated the *DiGiuro* decision, whether its decision should be applied prospectively only.

STATEMENT REGARDING ORAL ARGUMENT

Movants, the Estate of Christina Wittich, by and through Judith Wittich and Frederick Wittich in their duly appointed capacities as Co-Administratrix and Co-Administrator (hereafter “the Estate”), request that oral argument be heard in this case. The Estate believes that oral argument will assist the Court in its final disposition because the issues are of significance in Kentucky.

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STATEMENT OF THE CASE

A. Procedural History.

Movants filed this action in the Fayette Circuit Court on August 22, 2008 seeking to hold Respondent, Michael Joseph Flick (hereafter “Flick”), civilly liable for the wrongful death of Christina Wittich on May 20, 2005. R. Vol. 1, at 1. Although Flick had been found guilty of the murder that formed the basis of the wrongful death suit in January 2008, he denied that he had murdered Christina Wittich in the Answer he filed in the Circuit Court.

On November 7, 2008, Flick filed a motion to dismiss arguing that the statute of limitations barred the Estate’s claims because the lawsuit was brought more than a year after the appointment of the personal representatives, who were appointed by the probate court on November 16, 2006. R. Vol. 1, at 15. The Estate responded that the action was timely filed pursuant to the Court of Appeals decision in *DiGiuro v. Ragland*, 2004 WL 1416360 (June 25, 2004) (attached as Exhibit 2), in which the Court of Appeals held that the statute of limitations for a wrongful death action resulting from murder does not begin to run until the accused is convicted. R. Vol. 1, at 24. The Estate noted that the Kentucky Supreme Court had affirmed the decision of the Court of Appeals. No reply brief was filed refuting the arguments offered by the Estate. The Fayette Circuit Court denied Flick’s Motion by Order dated December 18, 2008 and entered by the Clerk of the Court on December 29, 2008. R. Vol. 1, at 53. (Exhibit 3).

The case proceeded to trial on September 29, 2009. No defense was presented. The Court directed a verdict in favor of the Estate on the issue of liability. (9/29/09 VR

1:36:28).¹ The jury returned a verdict in favor of the Estate and awarded compensatory damages and punitive damages. The Fayette Circuit Court entered a Trial Order and Judgment on the jury verdict on November 20, 2009. No post-trial motions were filed on any grounds.

Flick filed his Notice of Appeal on December 18, 2009. R. Vol. 1, at 81. The Court of Appeals rendered its Opinion Reversing and Remanding on February 6, 2015. (Exhibit 1). In a two to one opinion, with Judge Lambert dissenting without opinion, the Court of Appeals reversed the judgment of the Fayette Circuit Court and remanded for entry of an order of dismissal of the Estate's Complaint. The Estate timely filed its Motion for Discretionary Review on March 9, 2015.

B. Statement Of The Facts.

On May 20, 2005, Christina Wittich was living with her boyfriend, Dr. Randall Lambirth, an optometrist, in Lexington, Kentucky. Christina was 28 years old at the time (VR 1:33:20).

Flick was also an optometrist and worked for Lambirth after selling his practice to him. Lambirth and Flick had a dispute in September 2004 after Flick gave false reasons for being off of work. Lambirth terminated his employment. (VR 11:09:03-11:09:26).

On May 20, 2005, Flick drove to the Lambirth/Wittich residence prior to Lambirth returning home. *Flick v. Commonwealth*, 2009 WL 1451923 (Ky. 2009). Prior to exiting the vehicle, Flick retrieved a gun, a 38 special. (VR 11:22:25-11:23:19). Flick had stolen the gun from friends for whom he sometimes house sat. (VR 11:25:58-

¹ All references to the video record will refer to the September 29, 2009 trial proceedings unless explicitly noted otherwise.

11:26:32). Flick shot Wittich in the back. As she tried to turn around, Flick shot her again in the side. (VR 1:18:40-1:20:10) (describing wounds).

Lambirth, who was recovering from gall bladder surgery, arrived home between 6:45 and 7:00. (VR 11:11:30-11:11:45). As Lambirth approached the door going in through the garage, he thought he heard a noise. Lambirth found Wittich lying in a pool of blood on the kitchen floor. As Lambirth was attempting to roll Wittich over, he heard another noise. When Lambirth looked up, Flick had emerged from a hiding place and was standing over him pointing a gun at him. Flick shot. (VR 11:12:14-11:12:20). Lambirth's brother had accompanied him to the residence and the two brothers were able to subdue Flick while they awaited help. (VR 11:12:20-11:12:25).

Christina Wittich was transported to the University of Kentucky Medical Center where she was pronounced dead. (VR 11:14:04-11:14:30). A subsequent autopsy revealed that Wittich died from multiple gunshot wounds. (VR 1:30:39). The path of the bullets caused internal bleeding that resulted in Wittich's blood losing oxygen carrying capacity. The deprivation of oxygen in the blood and inability of the lungs to inflate properly was similar to a death by asphyxiation. (VR 1:21:19-1:22:11). The forensic pathologist estimated that Wittich survived several minutes after being shot. (VR 1:22:44-1:22:53).

Flick was also taken to the Medical Center where he was treated for cuts and bruises. *Flick*, 2009 WL 1451923. While he was there, Detective Matt Brotherton, the homicide detective assigned to investigate Wittich's death, attempted to take a statement from Flick, who had received his Miranda rights from a fellow officer. (VR 11:21:45-11:21:58). Flick claimed that when he pulled in his driveway that evening, he saw

Lambirth and his brother coming towards his car. Flick claimed he feared for his safety and retrieved a gun that was in his glove compartment and put it in his pocket. Flick alleged that the brothers “sandwiched him” in the front seat of the car and drove to the Wittich/Lambirth residence. According to Flick, the brothers began to heckle him. Flick claimed that out of fear for his safety, he pulled the gun from his pocket and began to shoot. (VR 1:22:25-11:23:19). Flick thereafter invoked his right to counsel and Detective Brotherton immediately ceased the questioning. Subsequently, Flick was charged with Christina Wittich’s murder and transported from the hospital to the detention center. (VR 11:24:05).

Detective Brotherton did not find Flick’s version of the events credible for a number of reasons including Lambirth’s physical limitations from recent surgery. Detective Brotherton attempted to speak with Flick again on May 21, 2005 to follow up on inconsistencies. Incredibly, Flick claimed he did not remember Brotherton or their prior conversation. (VR 11:25:47-11:25:55). After a few questions, Flick again invoked his right to counsel and Detective Brotherton ceased questioning.

In the criminal proceeding, Flick defended that he was acting under extreme emotional distress at the time he murdered Christina Wittich. The jury disagreed and convicted him of Christina’s murder. The jury also convicted Flick of second-degree assault of Lambirth acting under extreme emotional distress and first degree burglary. Flick was sentenced to life imprisonment for murder, five years for assault and ten years for burglary.

C. The Trial Court Proceedings.

The Fayette Circuit Court conducted a Hearing on Flick's Motion to Dismiss on December 5, 2008 R.Vol.1, 12/05/08 Video Recording. At the Hearing, Flick's counsel asserted that the Estate's action was not rendered timely filed under the Court of Appeals' decision in *DiGiuro* contending only that *DiGiuro* created a narrow "unsolved murder exception" to the statute of limitation. 12/05/08 VR 14:01:28-14:01:51. Counsel reasoned that because Flick was immediately identified as Christina Wittich's assailant, the Estate's Complaint was time barred. 12/05/08 VR 14:02:20; 14:03:00-14:03:08. The Estate responded that *DiGiuro* clearly and unambiguously held that the statute of limitations in a wrongful death action based on murder begins to run on the date of conviction and that its decision had been affirmed by the Supreme Court. (Order Affirming is attached as Exhibit 4). The Estate further noted that Flick had plead not guilty in the criminal action and denied that he had murdered Christina Wittich in the Answer he filed in Fayette Circuit Court. 12/05/08 VR 14:03:46-14:04:15. Furthermore, the Estate argued that the facts presented to the Court of Appeals in *DiGiuro* were not distinguishable from those presented in the instant matter. Although the murderer's identity in *DiGiuro* went undetected for a period of five and one half years after DiGiuro's death, the identity of the potential murderer, Shane Ragland, was discovered in January 2000. Ragland was indicted on August 29, 2000 and convicted on March 27, 2002. DiGiuro's Estate filed a wrongful death action on July 1, 2002 which was deemed timely filed. 12/05/08 VR 14:04:40. Thus, the Estate reasoned that the *DiGiuro* decision could not be interpreted as creating a narrow exception for "unsolved" murders.

The Fayette Circuit Court agreed that *DiGiuro* was controlling and that the statute of limitations began to run on the date of conviction. The Circuit Court emphasized that the *DiGiuro* decision was never depublished. 12/05/08 VR 14:05:08. The Circuit Court further determined that Flick's counsel failed to consider the totality of the Court of Appeals' decision in *DiGiuro* in which the Court of Appeals expressly held that the public policy of the Commonwealth of Kentucky would not be furthered by applying the general statute of limitations but, rather, it would be furthered by allowing the family of a murder victim to wait until conviction of a defendant to file suit. 12/05/08 VR 14:06:00-14:06:35. In addition, the Circuit Court noted that the Court of Appeals had failed to define what constituted an "unsolved murder." 12/05/08 VR 14:06:54-14:07:19.

D. Proceedings In The Court of Appeals.

The single issue relating to the statute of limitations presented in the Court of Appeals by Flick was whether the *DiGiuro* decision created a narrow exception that tolled the limitations period for bringing a wrongful death action arising from murder only when the identity of the murderer went undetected. Respondent did not argue that: (1) *DiGiuro* was not binding on the trial court; (2) the Court of Appeals should reconsider the validity of *DiGiuro*'s reasoning because the decision was persuasive authority, only; or (3) *DiGiuro* was wrongly decided. The Estate argued that the clear and unambiguous holding of *DiGiuro* was that the public policy of the Commonwealth mandated that the statute of limitations in a wrongful death/murder case began to run on the date of conviction. The Estate urged that other jurisdictions had relied on the same policy considerations recognized in *DiGiuro* in adopting, either legislatively or judicially, a

“murder exception” tolling the statute of limitations in wrongful death actions until the date of conviction.

The Court of Appeals rendered its Opinion Reversing and Remanding on February 6, 2015. The Court of Appeals did not hear oral argument. Although no issue had been presented concerning the validity of *DiGiuro*, the Court of Appeals concluded that “[i]n the current appeal, we are directly presented with the question of whether the holding of *DiGiuro v. Ragland* remains valid.” Opinion at 5. The Court noted that the Supreme Court had accepted discretionary review of the *DiGiuro* case but due to a vacancy, the Court split three to three, resulting in an affirmance of the Court of Appeals’ decision. The Court further stated that “this Court’s opinion remained unpublished by operation of CR 76.28(4).” *Id.* In the Court’s view, CR 76.28 does not distinguish between opinions that were originally designated as “not to be Published” and those that are subsequently “designated as unpublished by order of the Supreme Court.” *Id.* at 6. The Court determined that it could consider the 2004 *DiGiuro* opinion as persuasive authority that was not binding and, accordingly, revisited the validity of its prior opinion.

The Court of Appeals found that “*DiGiuro* sets out compelling public policy arguments why the statute of limitations should be tolled until the defendant is criminally convicted of murder,” but further found that “these policy considerations must yield where the General Assembly has clearly addressed the subject.” Opinion at 6. The Court did not expound where the General Assembly had addressed the subject. The Court of Appeals reversed and remanded the matter to the Fayette Circuit Court for entry of an order of dismissal.

ARGUMENT

A. The Court Of Appeals Exceeded Its Authority In Reversing the Circuit Court On An Issue That Was Not Preserved Or Argued.

1. An Appellate Court May Not Reverse The Circuit Court On An Unpreserved Legal Ground Absent Palpable Error.

The issue that was presented for review before the Court of Appeals was whether *DiGiuro's* holding that the statute of limitations began to run on the date of conviction created a “narrow exception” to the statute of limitations where the identity of a murderer was not immediately known. Flick did not argue, either at the trial court or the Court of Appeals, that *DiGiuro* was wrongly decided. Flick did not argue that its rationale need not be followed because it only constituted “persuasive authority.” The Court of Appeals, nonetheless, revisited what it considered the “validity” of the *DiGiuro* opinion and reversed the Circuit Court’s Judgment without providing the parties with an opportunity to brief and argue the issue, thereby exceeding the scope of permissible judicial review.

It is well-established that an appellate court “is without authority to review issues not raised in or decided by the trial court.” *Regional Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). It is an “unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in [an appellate] court.” *Combs v. Knott County Fiscal Court*, 141 S.W.2d 859, 860 (Ky. 1940). The well-established reason for the rule regarding preservation is to provide the trial court with a reasonable opportunity to consider the question during the trial proceedings so that any problem may be resolved at that time, thereby possibly avoiding the need for an appeal. *Gulf Oil v. Vance*, 431 S.W.2d 864, 865 (Ky. 1968). The function of the

appellate court is to review for errors committed by the trial court and not for “nonrulings” when the issue has not been presented to the trial court for decision. *Turner v. Commonwealth*, 460 S.W.2d 345, 346 (Ky. 1970). Thus, the Court of Appeals would have been precluded from reviewing a challenge to the validity of the *DiGiuro* decision even if it had been raised by Flick on appeal. See, e.g., *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011); *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009).

Here, not only did the Court of Appeals decide the case based on an issue that was not presented to the trial court, the Court of Appeals *sua sponte* raised and resolved the issue as grounds for reversing without providing the parties an opportunity to brief and argue the issue. In *Harrison v. Leach*, 323 S.W.3d 702 (Ky. 2010), this Court considered the authority of the Court of Appeals to *sua sponte* raise the issue of standing and reverse the trial court’s order granting custody to grandparents over the father’s objection. This Court determined that it did not need to analyze the standing issue because the father had failed to raise standing in the trial court and, therefore, any potential error regarding standing had been waived. This Court stated that “[e]ven assuming for the sake of argument that the Harrisons lacked standing, the Court of Appeals erred by raising the issue for [the father’s] benefit even though [the father] himself had not done so.” *Id.* at 706. The Court reasoned that “[s]ince a defendant benefits from early termination of a case, . . . we believe that a defendant should not be permitted to stand mute at the trial court level . . . only to raise the issue on appeal (or, as in this case, continue to ignore the issue but ultimately benefit from an appellate court’s raising it on its own). Such an approach would be a grossly inefficient use of the time and resources of the parties and of

trial courts and would be a disincentive for attorneys to comply with their duty thoroughly and timely to determine [all issues] at the infancy of litigation.” *Id.* at 708-09.

Nowhere in the record was any inference raised that the *DiGiuro* opinion should not be followed. Accordingly, the Court of Appeals exceeded the permissible scope of judicial review and erred in making a dispositive argument on Flick’s behalf. *Knott County Bd. of Educ. v. Patton*, 415 S.W.3d 51, 56 (Ky. 2013) (Court of Appeals erred in asserting cause of action on complainant’s behalf that was not included in complaint, response to motion for summary judgment or even in argument in Court of Appeals); *see also Cabbage Patch Settlement House v. Wheatly*, 987 S.W.2d 784, 786 (Ky. 1999) (Court of Appeals had no authority to review issue of willful or wanton negligence on appeal where complaint only alleged negligence and carelessness); *City of Hazard v. Baker*, 419 S.W.2d 535 (Ky. 1967) (noting that trial judge was not a party and could not raise city’s right to condemn on behalf of litigant).

In *Fischer v. Fischer*, 348 S.W.3d 582 (Ky. 2011), this Court analyzed the circumstances in which the Court of Appeals can reverse a judgment of the Circuit Court on an issue that was not specifically raised at the trial court. In *Fischer*, the appellee argued on appeal that an oral agreement pertaining to relinquishing rights to part of his inheritance was void because he could not contract to transfer an expectancy in an estate during the decedent’s lifetime. Although the issue raised was a correct statement of the law, the argument was not made to the trial court. The Court of Appeals determined that the argument had not been properly preserved and, therefore, could not be urged on appeal. Nonetheless, the Court of Appeals reversed the verdict rendered by the jury in

appellants' favor finding that the contract failed for lack of consideration, an issue that was not raised at trial or on appeal.

This Court determined that when reviewing questions of law, where the trial court is correct in its ruling, an appellate court may affirm even if it might cite legal reasons other than those stated by the trial court. The appellate court is more stringently limited, however, in reversing on unpreserved grounds. The Court summarized:

But when an appellate court determines to reverse a trial court, it cannot do so on an unpreserved legal ground unless it finds palpable error, because the trial court has not had a fair opportunity to rule on the legal question. Though this policy of placing the burden on the appealing party to have raised an issue before the trial court may appear unfair, since it essentially favors affirming the lower court, the simple fact is that the burden must be placed on someone and there must be a default position, either affirming or reversing, with which to approach cases. . . . Ultimately, it is the responsibility of the movant to put a legal ground before the court, because it is, after all, his motion, and he bears the burden of proof and persuasion.

Id. at 590.

In both the Circuit Court and the Court of Appeals, Flick raised a specific and discrete argument that *DiGiuro* created a very narrow exception to the general rules regarding statute of limitations that was not applicable to the facts before the Courts. In contending that discretionary review was not warranted, Flick urged, nonetheless, that the Court of Appeals did not stray from the issues that were presented to or decided by the Circuit Court. Flick conceded that the weight that should be given to the *DiGiuro* decision was not addressed by either party but offered that he had argued that *DiGiuro*'s holding did not apply to the facts of the case, thereby presumably giving the Court of Appeals *carte blanche* in analyzing *DiGiuro*'s underlying reasoning. This Court's decision in *Fischer* easily disposes of Flick's claim. In *Fischer*, the Court of Appeals

reversed on an issue that was not raised by any party under the belief that because the appellee had argued generally that the contract was invalid, any issue going to the validity of the contract was preserved. In rejecting the notion, the Supreme Court emphasized that no broad claim of invalidity was made and, therefore, the appellate court was limited to considering the arguments addressed by the parties. This Court summarized: “Similarly, a trial court’s interpretation of the law is reviewed de novo, meaning it is entitled to no deference by the appellate court, but that standard of review does not mean that the appellate court is free to then address any and all legal issues that might affect the case. Rather, the court is bound to address only the question of law presented before a trial court may be reversed.” *Id.* at 590.

The Court of Appeals herein exceeded its authority in reversing the Circuit Court’s judgment on an unpreserved legal argument. The judgment of the Circuit Court, therefore, must be affirmed.

2. The Circuit Court Did Not Commit Palpable Error By Following The Only Precedent Available.

As the *Fischer* Court made manifestly clear, the Court of Appeals was limited to considering arguments properly preserved by Flick absent palpable error. Wholly absent from the Court of Appeals’ Opinion is any inference whatsoever that the Fayette Circuit Court committed palpable error in finding that the Estate’s Complaint was timely under the *DiGiuro* reasoning. Indeed, under any analysis, the Fayette Circuit Court’s conclusion that the Estate’s complaint was timely under the explicit holding of *DiGiuro* would not constitute palpable error.

An error is palpable only when it is “easily perceptible, plain, obvious and readily noticeable.” *Burns v. Level*, 957 S.W.2d 218, 222 (Ky. 1997) (quoting *Blacks Law*

Dictionary (6th ed. 1995)). A palpable error must involve prejudice more egregious than that occurring in reversible error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006). Palpable error can only occur by some action taken by the Court rather than from an act or omission by the attorneys or litigants. *Burns*, 957 S.W.2d at 222; *Carrs Fork Corp. v. Kodak Mining Corp.*, 809 S.W.2d 699, 701 (Ky. 1991).

Even assuming that the Circuit Court incorrectly determined that the *DiGiuro* decision, which as noted by the Circuit Court was never depublished, stated that the prescribed limitations period, the Circuit Court's reliance on the only judicial decision discussing the murder exception to the statute of limitations cannot be considered palpable error. Indeed, as noted by this Court in *Burns*, "it was not possible for the trial court to have committed palpable error in following the law as it was then stated." *Burns*, 957 S.W.2d at 222.

Furthermore, no serious argument could be made that any alleged error in following *DiGiuro* was "easily perceptible, plain, obvious and readily noticeable." To the contrary, the Court of Appeals herein recognized that compelling policy considerations supported *DiGiuro*'s reasoning and that it could "appreciate the rationale of *DiGiuro* holding that the wrongful death statute is remedial in nature and the Wittich's family deserves a remedy." Opinion at 8. The Court of Appeals "reluctantly" set aside the jury verdict in a case where liability was not an issue. The Court's reticence in setting aside the verdict, coupled with its need to completely reanalyze the underpinnings of the *DiGiuro* decision, establish that any error on the part of the Circuit Court in following *DiGiuro* does not rise to the level of plain, obvious and readily noticeable error.

To the extent that any error was committed at the trial court level, it was Flick's failure to challenge the validity of the *DiGiuro* decision. "[S]uch omission by Appellant does not equate to palpable error." *Burns*, 957 S.W.2d at 222 (counsel's failure to raise a constitutional challenge did not render decision of trial court to be palpable error). In the absence of a palpable error, the Circuit Court judgment must be affirmed.

B. The Court Of Appeals Arbitrarily Determined That It Could Depart From Precedent By Truncating Rules of Procedure Regarding Publication Of Opinions In Concluding That *DiGiuro* Was Persuasive Authority, Only.

In *DiGiuro*, the Court of Appeals unambiguously held that a cause of action under the wrongful death statute arising from murder begins to run on the date of the criminal conviction. Originally, the case was designated "to be published." Thus, the decision was intended as being binding authority in the Commonwealth. The Supreme Court accepted discretionary review and, therefore, publication was suspended under CR 76.28(4)(a). In 2005, this Court affirmed *DiGiuro* in a three to three decision by operation of Supreme Court Rule 1.020(1)(a). The Supreme Court's Order affirming was silent as to whether the Court of Appeals original decision should be reinstated for publication.

The Court of Appeals in this case determined that it was "directly presented with the question of whether the holding of *DiGiuro v. Ragland* remains valid" even though the issue was not presented for review. Opinion at 5. The Court of Appeals referenced the rules regarding publication of Court of Appeals' opinions to undermine the validity of *DiGiuro*, which was originally designated to be published. According to the Court of Appeals, CR 76.28 does not distinguish between opinions which were originally designated as "not to be published" and those subsequently as "unpublished by order of

the Supreme Court.” In determining that it was not bound by its prior decision in *DiGiuro*, the Court of Appeals offered that “[i]n either case, CR 76.28(4)(c) provides that ‘[o]pinions that are not to be published shall not be cited or used as binding precedent in any court of this state. . . .’”

The Court of Appeals erred in its analysis of the publication rules in CR 76.28 in concluding that *DiGiuro* was only persuasive authority. The only reasonable construction of CR 76.28(4)(c), which expressly refers to opinions that are “not to be published” and not to be cited as binding authority, is that the Rule applies to opinions that the Court of Appeals determines at the time a decision is rendered is not to be published. CR 76.28(4)(a) discusses the procedure where a motion discretionary review is filed with the Supreme Court. Under this provision, “the case under review shall not be published until the Supreme Court rules on the motion for discretionary review or the Court permits the motion to be withdrawn.” Once a motion for discretionary review is granted, as happened in *DiGiuro*, the Rule provides that “the opinion of the Court of Appeals shall not be published, unless otherwise ordered by the Supreme Court.” Although the Supreme Court issued an Order affirming in *DiGiuro* pursuant to Supreme Court Rule 1.020(1)(a), the Order was silent as to whether the Court of Appeals decision should be released for publication.

The Court of Appeals incorrectly stated that the *DiGiuro* opinion was “unpublished by order of the Supreme Court.” The opinion was not published by operation of the Rules of Procedure. The Supreme Court’s order affirming was silent regarding publication of the original opinion. Nonetheless, the *DiGiuro* Opinion was designated to be published and, whether by operation of the Supreme Court rules or not,

it was affirmed by the Supreme Court. The Court of Appeals wholly ignored the fact that a prior panel intended its decision to be binding precedent and, in effect, improperly overruled a prior panel. Furthermore, the Court of Appeals completely ignored the effect of the affirmance by this Court in determining that *DiGiuro* was only persuasive authority, thereby usurping the role of this Court.

The Court of Appeals erred in refusing to follow and apply its prior decision in *DiGiuro*. Accordingly, the judgment of the Fayette Circuit Court should be affirmed.

C. The Court Of Appeals Erred In Rejecting The Policy Considerations On Which It Relied In *DiGiuro* In Reversing The Trial Court's Decision.

The Fayette Circuit Court followed the Court of Appeals decision in *DiGiuro v. Ragland*, 2004 WL 1416360 (June 25, 2004), specifically noting that the opinion had not been depublished, in holding that The Estate's claims were timely filed. Even assuming that the Court of Appeals acted within its authority in revisiting the validity of the *DiGiuro* opinion, it erroneously concluded that the General Assembly had clearly addressed the subject of the limitations period thereby precluding the Court from relying on public policy considerations to toll the statute of limitations in wrongful death cases arising from murder.²

² An internal inconsistency exists in the Court of Appeals decision. On the one hand, the Court of Appeals asserted that the General Assembly had addressed the subject of the prescribed limitations period, presumably referencing its adoption of the one year period prescribed in *Conner v. Whiteside*, 834 S.W.2d 652, 654 (Ky. 1992). On the other hand, the Court "recognize[d] that there may be a more specific question of whether the statute of limitations should accrue when a suspect is first identified, first arrested, first charged or first indicted for the crime." Opinion at 7. The *DiGiuro* Court's recognition that the courts could determine accrual of the limitations period is inconsistent with its statement that the General Assembly had already spoken on policy considerations.

1. The Court Of Appeals Erred In Determining That The General Assembly Has Clearly Addressed The Applicable Limitations Period.

As noted by the Court in *DiGiuro*, Kentucky has had several versions of wrongful death statutes, some of which included time limitations. The present version of Kentucky's wrongful death statute, however, does not. KRS 411.130(1) provides:

Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered from the person who caused it, or whose agent or servant caused it. If the act was willful or the result of gross negligence, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

Although no limitations period is prescribed under KRS 411.130(1), courts have routinely applied a one year limitations period to wrongful death cases using the general limitations period in KRS 413.140. Under KRS 413.140(1)(a), an action for injury to the person must be commenced within one year of the accrual of the cause of action. "Clearly, however, KRS 413.140 on its face does not include wrongful death actions." *DiGiuro*, Opinion at 5. The *DiGiuro* Court recognized that the Kentucky Supreme Court determined that wrongful death actions fell within the ambit of KRS 413.140 because "[d]eath is simply the final injury to the person." *Id.* (quoting *Conner v. Whiteside*, 834 S.W.2d 652, 654 (Ky. 1992)).

KRS 413.180 governs the time limitation for a personal representative of a deceased to bring a cause of action. KRS 413.180 provides, in pertinent part:

(1) If a person entitled to bring **any action mentioned in KRS 413.090 to 413.160** dies before the expiration of the time limited for its commencement and the cause of action survives, the action may be brought by his personal representative after the expiration of that time, if commenced within one (1) year after qualification of the representative.

(2) If a person dies before the time at which the right to bring any action mentioned in KRS 413.090 to 413.160 would have accrued to him if he

had continued alive, and there is an interval of more than one (1) year between his death and the qualification of his personal representative, the representative, for purposes of this chapter, shall be deemed to have qualified on the last day of the one year period.

(emphasis added). Although the wrongful death statute was not explicitly included in KRS 413.180, the *Conner* court held that wrongful death actions fell under its umbrella because KRS 413.140 had long been recognized as establishing a one year limitation period for wrongful death actions and is specifically included in KRS 413.180.

The Kentucky Legislature did not expressly include wrongful death actions among the actions that must be commenced within one year in KRS 413.140. If, indeed, it was not within the purview of the Court in *Conner v. Whiteside*, to determine by judicial decision that even though the Legislature was silent a one year limitations period would apply, wrongful death actions would have to be governed by the five year limitations period under KRS 413.120 for “[a]n action upon a liability created by statute, when no other time is fixed by the statute creating liability.”

The *Conner* decision has had the force and effect of law for over 25 years. The one year limitations period for bringing wrongful death actions was mandated through the inherent power of the judiciary. Accordingly, the Court of Appeals erred when it determined that it could not tread in an area on which the Legislature has spoken.

2. The Court Has The Inherent Authority To Rely On Policy Considerations In Determining The Time At Which The Statute Of Limitations Will Begin To Run In Furtherance Of The Preeminent Policy Of Providing Redress To Victims.

The Kentucky Legislature has undeniably acquiesced and accepted the judiciary’s conclusion that a one year statute of limitations applies in wrongful death actions. The length of the statute of limitations, however, is a question completely apart from a

determination if the running of the statute of limitations should be tolled based on particular circumstances. Indeed, the Court of Appeals tacitly acknowledged that it is within the inherent authority of the courts to determine the time at which a cause of action occurs for purposes of the statute of limitations. The Court “recognize[d] that there may be a more specific question of the statute of limitations should accrue when a suspect is first identified, first charged or first indicted for the crime.” Opinion at 7. Thus, even though the Court of Appeals concluded that the General Assembly had clearly spoken on the subject of the statute of limitations, it recognized that the Court of Appeals had authority to determine the time of accrual. In this regard, the Court of Appeals erred in determining that wrongful death cases arising from murder could accrue on various dates other than the date of conviction rather than adhering to its decision in *DiGiuro*.

The *DiGiuro* Court examined the purposes of statutes of limitations in determining that public policy mandated that the limitations period in a wrongful death case that resulted from a murder began to run from the date of conviction rather than death. In this regard, the Court noted that it must consider the intended purpose of the statute of limitations and the “mischief intended to be remedied.” *Id.* at 7 (quoting *Commonwealth v. Kash*, 967 S.W.2d 37, 43-44 (Ky. App. 1997)). Most notably, statutes of limitations bar stale claims arising from transactions or occurrences that took place remote in time. According to the United States Supreme Court, “[s]tatutes of limitation find their justification in convenience rather than logic. . . . They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared,

and evidence has been lost.” *Mills v. Habluetzel*, 456 U.S. 91, 102 (1992) (quoting *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).

The *DiGiuro* Court emphasized that statutes of limitation can be arbitrary and sometimes operate to halt legitimate claims. To prevent such harsh application, the courts and the legislature have carved out exceptions to the rule including, but not limited to: private contractual arrangements extending limitations period; tolling during periods of minority or disability; tolling based on equitable principles where a defendant conceals himself or absconds; and extension of a statute under the discovery rule under which a cause of action will not accrue until a party discovers or should have discovered not only that he or she has been injured but, also, that his injury may have been caused by the defendant’s conduct.

The Court of Appeals in *DiGiuro* found no consensus in its review of the treatment of other states with regard to the statute of limitations in wrongful death cases based on a murder. Accordingly, since the question could not be definitely answered by statute, the Court determined that the issue must be decided on public policy grounds. The Court emphasized the undeniable policy that victims have a right to redress for their injuries. The Court found that the same policy considerations that warranted adherence to the general statute of limitations in a wrongful death case resulting from a medical malpractice claim or a product liability claim were not furthered in a murder case. In the Court’s view, in a medical malpractice or product liability case, the statute of limitations fulfilled its intended purpose to prevent presentation of stale claims, protected a defendant from being unduly burdened with old claims and advanced prompt discovery of evidence to build a defense. With regard to a murder case, however, the Court

determined that delaying the civil matter would not subvert the public policy of resolving claims promptly even after Ragland was named a suspect and indicted. In fact, delaying the running of the statute until the finality of the criminal proceedings could operate to benefit the alleged murderer. The Court noted that “had the jury found him not guilty, this finding would have been beneficial to him in defending the civil action or the civil matter might be dismissed altogether.” *DiGiuro*, Opinion at 16. Alternatively, in circumstances in which a defendant ultimately plead guilty, “he would be hard pressed to challenge a civil matter where the burden of proof is lower.” *Id.*

Moreover, the *DiGiuro* court emphasized that the practicalities and procedure in situations where the same facts underlay a criminal and civil claim warranted a delay in the running of the statute of limitation until the conclusion of the criminal proceeding. In this regard, the Court noted that civil matters, including discovery therein, are almost exclusively stayed until the resolution of the criminal matter. The Court summarized:

Under the facts of this case, a stay would actually serve the purpose of effective use of judicial resources, as well as benefit the parties. Through the resolution of the criminal matter most discovery will take place.

In this matter, we are faced with a set of facts in which enforcing a statute of limitations, not specifically included by the General Assembly in the wrongful death statute, will not result in furthering the purpose of time limitations. Had Trent’s estate filed suit in this matter within one year of the discovery that Shane may have been responsible for Trent’s death, in all probability, the civil matter would have been stayed pending the outcome of the criminal matter. Hence, the statute of limitations would not operate as it would normally to end litigation and prevent stale claims.

In sum, we conclude that, under the facts of this particular case and in absence of a specific limitation period prescribed by the wrongful death statute, the public policy of this Commonwealth would not be furthered by using the general statute of limitations. Instead, we find that the **public policy of the Commonwealth would be furthered by allowing the family of a murder victim to wait until conviction of a defendant before filing suit.**

Id. at 17 (emphasis added).

A preeminent policy in the Commonwealth of Kentucky is that victims are entitled to redress. The Court of Appeals in this matter recognized the importance of such policy considerations yet determined, without explanation, that policy considerations should yield to a subject on which the General Assembly has spoken. The Kentucky Legislature has not, as pointed out in *DiGiuro*, included any limitations period in the wrongful death statute and, therefore, did not determine as a matter of policy that a specific statute of limitations should apply. Instead, the General Assembly acquiesced to the Court's interpretation of the appropriate statute of limitations in wrongful death cases, and in many situations in which the Courts have carved out exceptions to general limitations period, to avoid arbitrary application that halt legitimate claims. The *DiGiuro* decision should be adopted as setting forth the appropriate time, *i.e.*, conviction, for accrue of the statute of limitations.

The case on which the Court of Appeals herein relied in concluding that tolling was not appropriate during pendency of a criminal matter is distinguishable. The Court of Appeals cited to this Court's decision in *Dunn v. Felty*, 226 S.W.3d 68 (Ky. 2007), as authority that a civil claim may have to be brought before the related criminal charges are resolved. *Dunn* involved the accrual of the limitations period in a case involving false imprisonment by law enforcement officials. The appellant argued that the statute began to run when criminal charges were dropped rather than when the period of arrest ended and he was arraigned. In determining that the limitations period began to run when the imprisonment ended, this Court had the benefit of the analysis of a United States Supreme Court opinion discussing accrual in a Section 1983 case, which decision

“foreclosed Dunn’s arguments” that the date of dismissal of charges was the appropriate date. Furthermore, although not specifically addressed by the *Dunn* Court, a delay in the running of the statute of limitations period in a false imprisonment case could result in the “mischief intended to be remedied” by limitations periods that prevented the presentation of stale claims based on faulty memories, factors that are wholly inapplicable in a wrongful death case arising from murder.

A cursory review of the facts of this case conclusively demonstrates that adopting an exception to the general statute in wrongful death cases will not further any of the intended purposes of the statute of limitations. After denying he was culpable for murder in both the criminal proceeding and in the answer filed in Circuit Court, Flick failed to appear and defend himself in the Fayette Circuit Court. The murder conviction was placed into evidence. A directed verdict was entered on liability. Flick simply was not prejudiced by presentment of state claims, fading memories of lost evidence. *Allred v. Chynoweth*, 990 F.2d 527 (10th Cir. 1993). He was merely held accountable for his merciless action in murdering Christina Wittich.

In wrongful death cases arising from murder, the only logical and workable date for accrual for statute of limitations purposes is the date of conviction (or entry of a guilty plea). Until such time, only an allegation has been raised and the accused is entitled to a presumption of innocence. To accept the Court of Appeals’ suggestion that there may be a more specific question whether the limitations period should accrue when a suspect is first identified, first charged or first indicted would simply be unworkable. Judges in civil proceedings would be placed in a position that they would have to evaluate the strength of evidence against an accused at different points in the criminal proceeding,

information that would be difficult to uncover and involve “hindsight” analysis, in determining whether a complaint was timely filed. Accrual on the date of conviction would provide universal certainty to litigations and courts and preserve judicial resources by avoiding mini-litigation regarding accrual without causing any prejudice to the defendant.

3. *DiGiuro* Did Not Create A “Narrow Exception” For Unsolved Murders.

The Estate anticipates that should this Court agree that the *DiGiuro* court correctly defined accrual for statute of limitations purposes in wrongful death murder actions, Flick will contend that he was nonetheless entitled to an order of dismissal because *DiGiuro* only applies where the identity of the assailant is not immediately known. A cursory review of the facts in *DiGiuro* belies Appellant’s contention that the Court adopted a narrow exception for “unsolved” murder cases and, in fact, supports the conclusion that in murder cases, generally, the statute begins to run at the time a murder is “solved” through a conviction. Ragland was arrested on July 14, 2000, a preliminary hearing was held on July 19, 2000 and Ragland was indicted on August 29, 2000. Thereafter, Ragland was convicted by a jury on March 27, 2002. The Court found the wrongful death action initiated on July 1, 2002 to be timely. The unambiguous holding of the *DiGiuro* Court was that the statute of limitations began to run on the date of conviction. *DiGiuro* provides no support for Flick’s argument.

4. The Policy Considerations Identified In Cases from Other Jurisdictions Support A Conclusion That The Statute Of Limitations Begins To Run On The Date Of Conviction.

The Court of Appeals in *DiGiuro* reviewed case law from other jurisdictions in considering when the limitations period began to run for a wrongful death resulting from

murder.³ The issue was squarely decided by the Ohio Supreme Court in *Collins v. Sotka*, 692 N.E.2d 581 (1998). In *Collins*, the Court concluded that policy considerations warranted application of the discovery rule to extend the statutorily mandated two year period for bringing a wrongful death claim. The Court noted that a wrongful death claim was not triggered merely by death of a person but by a death caused by a wrongful act. According to the Court, the fact that a death occurred is irrelevant unless there is proof that a defendant was at fault and caused the death. Thus, the Court determined that the statute of limitations for a wrongful death that stemmed from a murder began to run when the victim's survivor discovered or should have discovered that the defendant had been convicted of murder. In this regard, the Court reasoned that:

It is illogical to penalize the victim's survivors, who have already suffered a great loss, by shortening or extinguishing the time in which they may bring a wrongful death lawsuit. To do so merely rewards the criminal defendant. Although the defendant may be held accountable in a criminal court for the horrendous crime he committed, he can nonetheless escape civil liability, all at the expense of the victim's family, and simply because of the harsh application of a statute of limitations.

Id. at 584; *see also Allen v. State*, 803 P.2d 54 (Wash. App. 1991), *aff'd*, 118 Wash. 2d 753 (1992) (assuming victim's family could have discovered essential elements of cause of action on date of conviction); *Allred v. Chynoweth*, 990 F.2d 527 (10th Cir. 1993) (defendant was acquitted by jury but later confessed to murder in a book; court held that despite arrest and probable cause hearing, plaintiff could not have discovered facts surrounding death prior to confession).

³ The Court noted that several jurisdictions had held that the statute of limitations was tolled at least until the identity of a murderer was discovered. *See Bennett v. FBI*, 278 F. Supp. 2d 104 (D. Mass. 2003); *Bernoskie v. Zarinsky*, 781 A.2d 52 (N. J. Super. 2001); *Friedland v. Gales*, 509 S.E.2d 793 (N.C. App. 1998). The Court did not find these cases dispositive to the issue presented because the actions were filed within the prescribed limitations period after discovery and, therefore, the courts did not address how they would have resolved the issue had the decedent's estates waited until after the conviction to file a civil action.

Several states have adopted statutory provisions that provide that the statute of limitations for a wrongful death claim is extended where death resulting from an intentional act constituting murder. For example, Minnesota Statute Section 573.02(1) (1996) contains an exception to the three year limitations period for wrongful death actions. The statute provides: “An action to recover damages for a death caused by an intentional act constituting murder may be commenced at any time after the death of the decedent.” (emphasis added). Illinois adopted a murder exception statute that became effective on January 5, 1984. Under the Illinois Code, Section 13-202, an action for damages against a person may be brought at any time if the action is based on conduct that constituted first degree murder, a Class X felony or a Class 1 felony and the person was convicted of one of the enumerated crimes. The New Jersey Legislature adopted a murder exception in 2000. N.J.S.A. 2A:31-3 provides that a wrongful death action must be commenced within two years after the date of death “provided, however, that if the death resulted from murder, aggravated manslaughter or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity or adjudicated delinquent, the action may be brought at any time.” In *Short v. Short*, 858 A.2d 571 (N.J. Super. 2004), the Court emphasized the concern expressed by the Legislature for the families of victims of murder that warranted a delay in the running of the statute of limitations. The Court quoted the Assembly Judiciary Committee, Statement A. 1934 (Nov. 17, 2000), as follows:

The committee discussion also emphasized the difficult task that is required under the current law of a person whose loved one has been murdered to consider commencing a wrongful death action in two years time. When the focus is on a criminal investigation and possible trial or plea agreement it appears to be almost impossible to consider pursuing a civil suit during that period. While certainly any person who has lost a

loved one under accidental circumstances may face difficulty going forward with an action, the committee felt that a murder or manslaughter victim's family may be particularly emotionally fragile and their attention too fragmented until the criminal matter has reached some resolution to even begin considering a civil suit. Their attention may simply be diverted with the aspects of the criminal case. Eliminating the statute of limitations for these wrongful death suits will preserve the right of murder and manslaughter victims' families to sue at some future date.

Short, 858 A.2d at 573-74.

Courts and legislatures are increasingly recognizing a "murder exception" to the running of statutes of limitations in wrongful death cases. Any other conclusion herein would reward the criminal defendant at the expense of innocent victims, thereby undermining Kentucky's policy of providing redress to victims.

D. The Court Of Appeals Failed To Address The Effect Of The Action Of The Legislature In Amending KRS 413.140 Without Incorporating Claims Under KRS 411.130 In June 2013.

At the Court of Appeals, the Estate argued that the Legislature presumably adopted the *DiGiuro* analysis when it amended KRS 413.140 effective June 25, 2013. The Estate noted that the original *DiGiuro* decision was rendered in 2004 and that the Court specifically found that because KRS 413.140 did not provide that it governed wrongful death actions, the running of the statute of limitations had to be examined under principles of statutory construction and policy considerations. The Court of Appeals determined that the statute began to run in a murder case at the time of conviction. The Supreme Court affirmed in a three to three decision in 2005. The Court of Appeals revisited the case in 2010 in a published opinion, expressly noting that the 2004 decision had been affirmed by the Supreme Court, and determined that under the law of the case, it was bound by the 2004 decision, which had been affirmed by the Supreme Court. *Ragland v. DiGiuro*, 352 S.W.3d 908 (Ky. App. 2010).

The Kentucky Legislature amended KRS 413.140 effective June 25, 2013. The amendment added a new subsection (l) relating to an action for damages arising out of a deficiency, defect, omission, error or miscalculation in any survey plat against a licensed professional land surveyor under KRS Chapter 413. Subsection (l)(a) relating to actions arising from injury to a person, however, remained unchanged. The Legislature did not include wrongful death actions brought under KRS 411.130 within the ambit of actions that must be commenced within one year. It is a well-established tenet that, in amending a statute, the Legislature is presumed to know not only the law but the interpretation given its prior enactments by the courts. *Combs v. Kentucky River Dist. Health Dep't*, 194 S.W.3d 823 (Ky. App. 2006); *Kentucky Real Estate Comm'n v. Milgron*, 197 S.W.3d 552 (Ky. App. 2006) (noting Legislature presumed to be aware of the interpretation of the court in a specific case).

The Kentucky Legislature had the opportunity when it amended KRS 413.140 to expressly include all wrongful death actions as governed by a one year limitations period. The Legislature failed to do so. “Thus, we must presume that the legislature intended to leave in force the legal standard announced” in *DiGiuro*. The decision to the contrary by the Court of Appeals herein must be set aside and the Judgment of the Circuit Court affirmed.

E. To The Extent That The Court Of Appeals Correctly Determined That *DiGiuro* Was Wrongly Decided, Any Decision Should Be Prospectively Applied Rather Than To Operate As A Bar To The Estate’s Claims.

It is well established that “[i]t is within the inherent power of a Court to give a decision prospective or retrospective application. It is further permissible to have a decision apply prospectively in order to avoid injustice or hardship. This is true where

property rights are involved and parties have acted in reliance on the law as it existed, and a contrary result would be unconscionable.” *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991).

At the time the Estate’s case was initially filed, the only authority in Kentucky specifically addressing when a cause of action accrued in a wrongful death case arising from a murder was the *DiGiuro* decision. Originally, the case was designated “to be published.” The Supreme Court affirmed in a three to three decision by operation of Supreme Court Rule 1.020(1)(a). Thus, the pertinent authority that existed on the date Christina Wittich was murdered, and the dates on which Flick was arrested, arraigned, indicted and convicted and the date the Estate’s Complaint was filed held that a claim would be timely filed so long as it was filed within one year of the date of conviction.

In *Jacobs v. Lexington-Fayette Urban County Government*, 560 S.W.2d 10 (Ky. 1978), a class action was brought demanding that the full urban services district tax be declared unconstitutional and void. The appellants claimed that the tax rate was greater than that permitted by Section 157 of the Kentucky Constitution and that the difference between tax rates in the full urban services district and the general services district violated the principles of uniformity embodied in Sections 171 and 172A of the Constitution. Although the Court ultimately agreed that the tax was unconstitutional, it applied its ruling prospectively only. In this regard, the Court stated that it had reexamined a prior decision and determined that “the language we used there was loose enough to permit a fair minded reader to infer that we approved of the tax rate differential. . . .” *Id.* at 14. The Court noted that while the Lexington Council did not rely on a long line of established precedents in passing the ordinance, it no doubt relied

on the only guidance available, which was furnished in a Supreme Court opinion. The Court concluded that to deprive the local government of tax revenues based on the Court's "less than precise pronouncement" would be unjust and constitute a hardship. *Id.*

Similarly herein, it would be unjust to apply any departure from *DiGiuro* in this action. The Circuit Court and the Estate relied on *DiGiuro* in determining the applicable limitations period that governed the Estate's action. The Estate pointed out that the *DiGiuro* opinion was affirmed by this Court and the Circuit Court expressly noted that the case was never depublished. A reasonable litigant and court could infer from the affirmance that the Supreme Court approved of the opinion. Moreover, no case law exists that would put a litigant or Circuit Court Judge on notice that in a situation such as the one currently before the Court (*i.e.*, a to be published decision does not reach publication where the case is affirmed by operation of a Supreme Court rule) that error could be committed by applying case law.

Furthermore, manifest injustice would result in applying any contrary decision to the Estate's case given that Flick did not preserve any issue relating to the continuing validity of the *DiGiuro* the alleged error was raised *sua sponte* by the Court of Appeals. In *Burns v. Level*, 957 S.W.2d 218 (Ky. 1997), the Court reviewed a decision of the Court of Appeals in which the Court of Appeals *sua sponte* raised the constitutional issue of the admissibility of collateral source evidence. No issue had been raised at the trial court level in *Burns* concerning the constitutionality of collateral source evidence. After the judgment but prior to review by the Court of Appeals, this Court rendered its decision in *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995), conclusively determining the constitutional issue. Despite the conclusiveness of the issue of inadmissibility of

collateral source evidence, the *Burns* Court concluded that the Court of Appeals erred in addressing an issue that was not preserved and retroactively applying the *Hedgespeth* decision. The Court summarized: “This Court has held that there should be no retroactive application of a new decision . . . unless the issue was preserved and, if necessary, constitutional issues properly raised during the pendency of the case. . . . [W]e conclude that because Appellant failed to properly preserve the issue, the Court of Appeals erred in retroactively applying *O’Bryan v. Hedgespeth, supra.*” *Burns*, 957 S.W.2d at 222 (citations omitted).

CONCLUSION

The Opinion of the Court of Appeals should be reversed and the Judgment of the Fayette Circuit Court reinstated.

Respectfully submitted,



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